IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case No. OP 17-0322

ROBERT D. BASSETT,
Plaintiff-Appellant,

v.

PAUL LAMANITA AND CITY OF BILLINGS,
Defendants-Appellees.

DEFENDANT-APPELLEE CITY OF BILLINGS' ANSWER BRIEF

On Certified Question from the United States Court of Appeals for
The Ninth Circuit Cause No. DV 15-35045

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STATEMENT OF THE ISSUE

The City of Billings, Montana (the "City") agrees with Robert Bassett's statement of the issue as presented by the Ninth Circuit.

STATEMENT OF THE CASE

While the City agrees with Bassett's general description of the procedural history of his lawsuit, it should be noted that Bassett did not raise the issue of certification when he opposed the summary judgment motion of the City in federal district court. Only after he lost on summary judgment did the untimely issue of certification get raised.

STATEMENT OF THE FACTS

The City agrees that Robert Bassett has generally reiterated in his statement of the facts those facts presented by the Ninth Circuit, but the City disagrees with the proposition that the Ninth Circuit's statement of the facts is complete or "agreed upon" by the parties. Moreover, the City disagrees with the commentary that Robert Bassett provides in the last paragraph of his statement of facts. This commentary should be stricken from Bassett's statement along with the pages from the deposition transcript submitted as part of Bassett's appendix.[1]

[1] Alternatively, if the Court is going to permit Bassett to submit additional facts to the Court, the City requests that it also be given that opportunity.

STANDARD OF REVIEW

Robert Bassett's statement of the standard of review does not accurately quote the language from State Farm Fire & Cas. Co. v. Bush Hog, LLC, 2009 MT 349, 353 Mont. 173, 219 P.3d 1249. The correct quote from Bush Hog is that this Court's review "is purely an interpretation of the law applied to the agreed facts underlying the action." Id. at ¶ 4 (emphasis added). The City does not believe there are "agreed facts" in this matter, but only those facts that the Ninth Circuit has provided this Court as part of its certification of the question. While the Ninth Circuit has provided a very basic formulation of the facts, they are not complete or even "agreed upon" by the City.[2]

SUMMARY OF ARGUMENT

The Court should answer the issue presented by the Ninth Circuit in the affirmative. The City and Officer Paul LaMantia ("LaMantia") did not owe Bassett a legal duty based on the application of the public duty doctrine. There was no showing by Bassett that a "special relationship" existed which would allow Bassett to pursue his tort claim. The sole basis of Bassett's appeal is that the public duty doctrine does not apply in situations where a governmental actor's conduct is alleged

[2] Bassett apparently agrees with this point since he has asked the Court to consider facts in addition to those presented by the Ninth Circuit.

to be the "sole cause" of the purported injury.[3] Bassett is attempting to create a new exception to the public duty doctrine which this Court has never recognized and which it should not recognize for the reasons set forth below.

Contrary to the assertions of both Bassett and the Montana Trial Lawyers Association ("MTLA"), this Court previously addressed two situations involving the public duty doctrine where a governmental agent was the direct and sole alleged cause of the injury. See Eklund v. Trost, 2006 MT 333, 335 Mont. 112, 151 P.3d 870 (county and sheriff's department which conducted high speed chase had a special duty to a pedestrian such that the public duty doctrine did not shield department and county from liability for pedestrian's injuries); Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 Mont. 437, 114 P.3d 1037 (involving dispatcher at the Montana State Hospital whose actions led to the death of an individual who had voluntarily committed himself to the state hospital). This Court applied the special relationship test of the public duty doctrine in each of these cases and reached different results. In Eklund, the government was not shielded by the doctrine because the Court found a special relationship existed. In Eves, the government was shielded by the doctrine because the Court found that no special relationship existed. Since the public duty doctrine analysis worked in each of these cases, there is no

[3] As explained in greater detail below, the City also disagrees that LaMantia's actions were the "sole cause" of the alleged injury to Bassett.

justification for creating a new exception to the doctrine as presented by Bassett or MTLA. As a result, the Court should answer the certified question in the affirmative.

ARGUMENT

I. The Court Has Applied the Public Duty Doctrine Where the Government is the Direct and Sole Cause of the Injury.

Bassett argues that the Court has never held that the public duty doctrine applies when a law enforcement officer is the sole alleged cause of the plaintiff's injury.[4] This statement is not accurate. In the case of Eklund, *supra*, the Court applied the doctrine to a situation similar to the instant case where a pedestrian was injured during a police chase. Id. at ¶¶ 6-18. The Court applied the statute governing high speed chases and found there was a "special duty" to the pedestrian who was injured during the chase. Id. at ¶¶ 35-39. Ultimately, the Court determined the public duty doctrine did not apply because there was a special duty, and liability could be imposed on the government for the pedestrian's injuries. Id. at ¶ 39.

Neither Bassett nor MTLA provide a legal rationale for deviating from the Court's analysis as set forth in Eklund. Since the Court went through the public duty analysis in the Eklund case to determine whether the government could be held liable for a pedestrian's injuries, there is no reason why a similar analysis cannot be undertaken in the present matter.

[4] As discussed below, the City does not concede that LaMantia was the cause of Bassett's injuries. At the very least, there were multiple causes of Bassett's injuries.

Aside from Eklund, and contrary to the argument raised by MTLA and Bassett, this Court has addressed the situation where a government actor is the sole cause of the alleged harm in Eves v. Anaconda-Deer Lodge County, *supra*. In Eves, Zachary Eves Bear Don't Walk ("Zachary") committed himself voluntarily to the Montana State Hospital ("Hospital"). Id. at ¶ 4. Later, he left the hospital grounds without telling anyone and walked into the countryside. Id. The temperature was near freezing and there was snow on the ground. Id. The Hospital's staff discovered Zachary was gone and telephoned local law enforcement to report the disappearance. Id. It was reported to the County dispatcher that there was a concern about Zachary's ability to care for himself. Id. The county law enforcement were asked to help locate Zachary. Id. "The dispatcher told the nursing supervisor that, because Zachary was a voluntarily committed patient, the police had no legal basis to stop and detain him." Id. In addition, and despite the County police officer being notified of Zachary's disappearance, no search was initiated. Id. Several weeks later, Zachary's body was found. Id. at ¶ 5. The autopsy showed that he died of exposure to the natural elements. Id.

Zachary's mother brought suit against the County asserting wrongful death and survivorship claims. Eves at ¶ 6. "She argued that the County owed a duty to try to find Zachary and that it breached that duty." Id. The State District Court granted the County's Motion for Summary Judgment, and an appeal was taken.

This Court began its analysis by stating that "[g]enerally, government officials do not owe a duty to specific members of the public, but only to the public as a whole." Eves at ¶ 9. "This rule of law is known as the public duty doctrine." Id. citing Nelson v. Driscoll, 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972 (internal quotation marks omitted). There are, however, exceptions to the doctrine and a specific exception "arises when there exists a special relationship between the police officer and an individual giving rise to a special duty that is more particular than the duty owed to the public at large." Id. quoting Nelson, ¶ 22.

There are four recognized circumstances where a "special relationship" may arise. Eves at ¶ 9 (citation omitted). Those four recognized circumstances are: (1) by statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and, (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff. Nelson at ¶ 22. In the instant case, Bassett never articulated which of the four recognized circumstances where a "special relationship" may arise apply to the established facts. Instead, Bassett has taken the position that the public duty doctrine simply does not apply at all based on the causation aspect of negligence.

Bassett's argument is not well-taken for the simple reason that Bassett cannot sidestep the duty element of negligence and jump straight to causation. On this point, the Eves case is analogous to the instant matter. Since Bassett failed to articulate any specific special relationship under the four-part test set forth above, his claim fails as a matter of law. The Court simply does not need to address the causation argument.

The MTLA cites Scott v. Henrich, 1998 MT 118, 288 Mont. 489, 958 P.2d 709, but its reliance on that case is misplaced for the fundamental reason that the public duty doctrine was not raised by the parties or addressed by the Court. Since that case did not deal with the issue presented in this matter, it is not even persuasive authority. See e.g. Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers, 357 U.S. 197, n. 2, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1978) (Government's reliance on British prize cases were not persuasive authority where the Court was interpreting rules governing civil procedure and the constitutional doctrine related thereto); Heller v. Osburnsen, 162 Mont. 182, 188, 510 P.2d 13, 16 (1973) (where authorities cited by appellant dealt with actions concerning suits to reform contracts, which was not the situation before the Court, the Court determined the cited authorities were not persuasive). Having not had the opportunity to address the public duty doctrine in Scott, the case cannot support the

conclusion that the public duty doctrine would not have applied or otherwise changed the outcome of the case.

The Court recently addressed another public duty case. See Kent v. City of Columbia Falls, 2015 MT 139, 350 P.3d 9, 379 Mont. 190. While that case warrants mentioning because it is so recent, it does not impact the analysis in this case except that it provides further support for the City of Billings. In Kent, the estate of the decedent brought an action against the city for negligence in connection with decedent's fall while skateboarding along a paved walking path. Id. at ¶ 1. The trial court entered summary judgment in favor of the city based on the public duty doctrine. Id. On appeal, this Court reversed stating that Columbia Falls' activity regarding construction of the trail at issue went beyond "a uniquely governmental activity." Id. at ¶ 44. As a result, Columbia Falls had assumed a duty to the decedent because:

> the City was actively involved in the design of the path, knew of its dangerous grade, had the statutory authority to compel a modification, and yet exercised its statutory and contractual authority to approve it. We conclude that the City could be held liable to Sara should Sara establish her claims premised on violation of statutory duty and/or the voluntary assumption of a duty to act with ordinary care.

Id. at ¶ 52.

The instant case is different because the City of Billings was involved in "a uniquely governmental activity" which was, of course, law enforcement through its police officers. The Court in Kent states as much when it discussed that the public

duty doctrine applies to "duties to the general public include law enforcement services and fire protection." Id. at ¶ 23. Law enforcement officers have no duty to a particular person because their duty is owed to the public at large and not to individual members of society. Id. quoting Gonzales v. City of Bozeman, 2009 MT 277, ¶ 20, 352 Mont. 145, 217 P.3d 487 (other citation omitted).

The recent decision of Kent supports the position of the City of Billings in this case because the law enforcement officer, LaMantia, had no duty to a particular person in this situation. There are no special circumstances that warrant a different outcome in this case.

II. The Public Duty Doctrine Should Focus on Duty and Not Causation.

The analysis for the public duty doctrine should be confined to the "duty" element of negligence. The doctrine reinforces the policy that an officer's duty is owed to the public at large, not to one individual member. Eves at ¶ 9; Nelson v. State, 2008 MT 336, ¶ 41, 346 Mont. 206, 195 P.3d 293 (citations omitted). When determining if the doctrine applies, the Court's analysis should not be directed at causation but rather whether a legal duty arises under a particular situation—a situation involving a special relationship. It is undeniable that the public duty doctrine has been applied to several different scenarios involving law enforcement officers. See e.g. Gonzales v. City of Bozeman, 2009 MT 277, 352 Mont. 145; Nelson v. Driscoll, 1999 MT 193, 295 Mont. 363, 983 P2d 972. The doctrine is

not applicable where a special relationship has been found. If no special relationship exists, no duty ever arises on behalf of the governmental agent to a particular plaintiff.

This Court's recent decisions involving public duty reaffirm that the public duty doctrine must be analyzed in situations involving law enforcement. Gatlin-Johnson vs. City of Miles City, 2012 MT 302, ¶ 17, 367 Mont. 414, 291 P3d 1129; Kent vs. City of Columbia Falls, *supra.* More importantly, the Court's recent decisions also restate that the analysis starts and ends with the question of a legal duty, not a discussion of causation as Bassett or MTLA ask this Court to take on.

Bassett cites to Gatlin in support of his argument, but that was a very different case involving premises liability rather than law enforcement. Id. at ¶ 20. This Court discussed the factors involved in determining whether a duty existed and determined that "the City to a duty to exercise reasonable care in maintaining its public parks." Id. at ¶ 23. This Court never reached causation in its analysis but focused solely on the duty element. The same approach is warranted in the present matter.

In Eves, the Court also addressed an issue where the government was the sole cause of the event that resulted in the death of a missing person. Id. at ¶¶ 4-6. One can argue as to whether the harm occurred as a result of an error of omission

rather than commission, but the distinction makes no difference. Moreover, the distinction should not make any difference for purpose of the doctrine.

Just as in the Eklund and Eves cases, Bassett's case should be decided under the typical public duty doctrine analysis. It is only because Bassett cannot show the special relationship necessary to avoid the doctrine that he seeks a new exception to the doctrine. There is no justification for doing so.

There is no dispute that LaMantia's actions were conducted in the delivery of law enforcement services on behalf of the City of Billings. LaMantia was dispatched to Bassett's neighborhood in the early morning hours as a police officer to respond to a complaint of a disturbance call to 911. LaMantia was in the act of pursuing a suspect in the dark of the night when he intersected with Bassett standing in his backyard in pitch black conditions. LaMantia could not see Bassett standing in his yard as LaMantia chased the suspect. Bassett did not announce to LaMantia that he was standing only a few feet away from him in the dark as he pursued the suspect through Bassett's yard.

Under these facts, the public duty doctrine is applicable and must be analyzed to determine if a legal duty is owed to the Appellant. A duty can only exist if there is a special relationship found between Bassett and LaMantia. Since none of the four recognized circumstances were present to find a special relationship, the public duty doctrine bars the claim.

III. Bassett Incorrectly Describes LaMantia as the "Sole Cause" of Bassett's Injury.

Bassett wants the Court to believe that Officer LaMantia was the "sole cause" of his injury, but that is an inaccurate characterization of the facts.[5] There are multiple causes of Bassett's alleged injuries. First and foremost, the male suspect who was being chased by LaMantia was the "cause" of Bassett's injury. But for the male suspect fleeing the police, LaMantia would not have been running in the dark in pursuit of the perpetrator. Second, Bassett himself caused his injuries by failing to announce his presence and inform LaMantia that he was the homeowner and not the perpetrator who LaMantia was chasing. Therefore, and at the very least, an issue of comparative fault exists between the fleeing suspect, Bassett, and LaMantia.

A finding of fault by either the fleeing suspect or Bassett would negate the fundamental basis of the certified question since LaMantia could not be considered the "direct and sole cause" of any harm suffered by Bassett. As stated in *Prosser and Keeton on Torts* § 41, at 266 (5th ed.1984), a party's conduct is a cause-in-fact of an event if "the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." Busta v. Columbus Hosp. Corp., 276 Mont. 342, 371, 916 P.2d 122, 139 (1996). As set forth in Montana's Pattern Jury Instruction, "The defendant's conduct

[5] It also raises the question as to whether the certified question is even applicable to the facts of this case.

is a cause of (injury/death/damage) if it helped produce it and if the (injury/death/damage) would not have occurred without it." Busta at id. citing Montana Pattern Instruction 2.08 (rev.11/1/89). In the present matter, LaMantia would never have been in Bassett's yard but for the fleeing suspect. As a result, that suspect is a cause of Bassett's alleged injuries, at the very least.

The characterization of LaMantia as the "sole cause" of Bassett's injuries underlies the problem with the issue that has been certified to the Court: it assumes a fact which may ultimately be found to be false. It also creates an illogical legal distinction in a situation based upon who caused the harm. For example, if it had occurred that, while chasing the perpetrator, the perpetrator had knocked down Bassett, everyone would agree that LaMantia would not be the "sole cause" of Bassett's injuries. Yet, if the facts are changed slightly, and it becomes the police officer who knocks down the bystander while chasing the perpetrator, then the police officer suddenly becomes the "sole cause" of the harm according to Bassett. This distinction is illogical especially in situations where the police are in the middle of an emergent situation and are called upon to make split second decisions.

The causation exception which Bassett asserts also creates a procedural problem for the courts. If an alleged victim is allowed to pursue the government as the "sole cause" of the harm, the government would necessarily assert as a defense that the alleged perpetrator was a significant contributing factor and, perhaps, bring

a third party claim against the perpetrator. If the jury determines that the perpetrator was indeed negligent or a contributing factor in causing the harm to the victim, then the City is no longer the "sole cause" and, presumably, the City would not be liable under the public duty doctrine as Bassett proposes. This example highlights the problem of using "sole cause" as a determination of whether to apply the public duty doctrine.

IV. The Reliance by Bassett and MTLA on Cases From Other Jurisdictions is Misplaced.

In an attempt to sway the Court to depart from Montana's long line of decisions interpreting the public duty doctrine, Bassett and MTLA refer to a few out of state and intermediate appellate court decisions in support of his arguments. None of these decisions provide any helpful analysis for this Court's decision in the present appeal. In Jones v. State, 425 Md. 1, 38 A.3d 333 (Md.Ct.App. 2012), the facts underlying the decision are inapposite to those in the present action. In that case, the Court of Appeals of Maryland held that the public duty doctrine did not protect the State against a claim for negligent retention and training when its police officers committed an unconstitutional arrest. Id. at 425 Md. At 25-26, 38 A. 3d at 347. The Jones case does not present facts, as in this appeal, where a police officer is pursuing a suspect in a dark and unlit area and must make a split second decision to protect himself from imminent (albeit mistaken) harm. As a result, Jones is not helpful to the present analysis. See also

Clark v. Prince George's County, 65 A.3d 785, 792 (Md.Ct.Spec.App. 2013) ("The holding in *Jones* is not relevant to the issue of immunity of a local government against common law tort claims brought against it directly, in its own capacity, for governmental acts or omissions, including allegations of negligent hiring, training, or entrustment.").

Bassett and MTLA also cite Liser v. Smith, 254 F. Supp. 2d 89 (D.D.C. 2003) in support of their position but that case is also easily distinguishable. In Liser, plaintiff brought tort claims of false arrest and imprisonment, libel and slander, Section 1983 and negligence against the District of Columbia and a police detective responsible for a mistaken arrest. Id. at 93. The plaintiff was released from custody when it became apparent that the bank's camera was inaccurate and the plaintiff had used the bank's ATM before the murder at issue occurred. Id. at 92. In Liser, the Court narrowed its applicability of the public duty doctrine to circumstances that "deals with the question whether public officials have a duty to protect individual members of the general public against harm from third parties or other independent sources." Id. at 102 (citations omitted). The Court held that it did not apply "where the government itself is solely responsible for that injury, which it has caused by the allegedly negligent use of its own police powers." Id. That is not the factual situation presented before the Court.

The Liser decision is also contrary to the long line of cases in Montana where the Court has applied the public duty doctrine to law enforcement officers' actions. On that point, it should be noted that the public duty doctrine continues to be recognized in most jurisdictions. See Estate of McFarlin v. State, 881 N.W.2d 51, 59 (Iowa 2016) citing Cope v. Utah Valley State Coll., 342 P.3d 243, 249–50 (Utah 2014) (surveying authorities to conclude the "public duty doctrine is recognized in most jurisdictions" and rejecting argument to abandon the doctrine); 18 Eugene McQuillin, *The Law of Municipal Corporations* § 53.18, 246–51 (3d ed. rev. vol. 2013) (noting the "public duty rule [is] in effect in most jurisdictions" and "protects municipalities from failure to adequately enforce general laws and regulations, which were intended to benefit the community as a whole") (other citations omitted). The Liser decision represents a minority viewpoint that would effectively eliminate the public duty doctrine's purpose in Montana.

MTLA cites District of Columbia v. Evans, 644 A.2d 1008 (D.C.1994), but reads it too broadly. That case involved a narrow exception to the rule where officers may be held liable when they negligently approach or detain mentally ill or otherwise mentally impaired individuals, who in turn cause a disturbance requiring the use of force against them. See Hundley v. District of Columbia, 494 F.3d 1097, 1105 (D.C.Cir. 2007) (other citation omitted). That narrow exception does not apply here.

MTLA's reliance on Bates v. Doria, 502 N.E.2d 454 (Ill.App.Ct. 1985), is also misplaced because that case involved the sexual assault by an off-duty deputy sheriff. Id. at 455. The Court determined that the conduct of an off-duty deputy sheriff in assaulting and raping the plaintiff was beyond scope of his employment, and thus county could not be held liable on theory of respondeat superior. Id. at 457-458. On the public duty doctrine question, the Court stated that it was inapplicable based "where plaintiff seeks to impose liability based upon the defendants' negligent employment of a law enforcement officer, not upon defendants' failure to prevent the commission of crimes." Id. at 458.
That is entirely different situation from the factual scenario in the instant matter, and the rationale of the Court in Bates is inapplicable.

Bassett cites to the North Carolina decision of Moses v. Young, 149 N.C. App. 613, 561 S.E. 2d 332 (2002), but that case is also distinguishable based upon North Carolina's unique statutory scheme and related case law. The decisions involving the public duty doctrine in North Carolina have been amended and redefined by legislation of their General Assembly. See Ray v. North Carolina Dept. of Transportation, 366 N.C. 1, 727 S.E. 2d 675 (2012). Moreover, a decision subsequent to Moses shows the fine line that exists between activity that "directly causes" harm and activity that "indirectly causes" harm. See Scott v. City of Charlotte, 203 N.C.App. 460, 467-468, 691 S.E.2d 747, 752-753 (2010) (Court

held that "officers, while engaged in their duties to protect the general public, made discretionary decisions that indirectly caused harm" to decedent. Police officers left motorist, whom they had stopped for erratic driving, in parking lot, where he later died from a brain hemorrhage.). These North Carolina cases are not only inapplicable in Montana but exemplify the types of problems that will result if the Court considers causation as a variable in whether to apply the public duty doctrine.

V. The Montana Federal District Court Decisions Support the City.

Bassett and MTLA have cited the case of Ratcliff v. City of Red Lodge, 2014 WL 526695 (D. Mont. 2014) rev'd 650 Fed.Appx. 484 (9th Cir. 2016) in support of their argument, but it should be noted that the District Court's decision was reversed on appeal and the officer was provided qualified immunity. Id. at 650 Fed.Appx. at 486. As a result, the District Court subsequently granted the defendants' motions for summary judgment. Ratcliff v. City of Red Lodge, 2016 WL 6135651*4 (D.Mont. 2016) appeal filed Case No. 16-35941 (9th Cir. November 15, 2016) In doing so, the District Court stated the following regarding the public duty doctrine issue:

> The Ninth Circuit's ruling that "no reasonable factfinder could find that Officer Stuber's limited use of force" was excessive is undisputedly dispositive of Ratcliff's negligence claim. Without any finding of excessive force, Officer Stuber could not have breached his duty of care by using excessive force. Ratcliff cannot prove breach and summary judgment on this claim is appropriate. Accordingly, the Court need not address the Public

Duty Doctrine.

Id. at ¶4. Thus, the original District Court decision is not good law.

The original District Court's decision in Ratcliff is also not in harmony with either this Court or other Montana Federal District Court decisions. See e.g. Estate of Peterson v. City of Missoula, 2014 WL 3868217 (D. Mont. 2014) rev'd in part on other grounds 2017 WL 1174402 (9th Cir. 2017); Peschel v. City of Missoula, 664 F. Supp. 2d 1149 (D. Mont. 2009). In Estate of Peterson, the Federal District Court granted summary judgment to the defendants, including Detective Krueger, on all negligence claims. Id. at ¶16. Plaintiffs alleged that Detective Krueger pressured the decedent to act as a confidential informant which ultimately led to decedent's suicide. Id. at ¶10. Although the negligence allegations were based solely on his direct, personal, contacts with the decedent, the district court granted summary judgment to Detective Krueger based on the public duty doctrine determining that none of the four exceptions to the doctrine established a special relationship between Detective Krueger and the decedent. Id. at ¶14. Consequently, no "duty" existed between the two that could support a negligence claim. Id. at ¶14. Moreover, the Court rejected a new exception to the public duty doctrine based on the foreseeability of harm to the plaintiff. Id. at ¶¶14-15.

In Peschel, plaintiff sued three Missoula police officers for unlawful arrest, excessive force and failure to provide necessary medical care. Id. at 1157. Similar

to Bassett, the plaintiff in Peschel alleged the police officers were the sole cause of his injuries. Id. at 1157-1158. The Federal District Court applied the public duty doctrine. Id. at 1166-1167. The Court found that the officers' custody of Peschel during an interrogation satisfied a specific exception to the special relationship of the public duty doctrine. Id. at 1167. Therefore, the public duty did not bar his recovery under a negligence theory. Id.; but see Wagemann v. Robinson, 2015 WL 3899226 (D.Mont. 2015) (summary judgment granted because Wagemann was never in custody and, therefore, no exception to the public duty doctrine applied).

There is no reason to adopt a causation exception to the public duty doctrine based upon the facts of this case. The special relationship analysis works appropriately in determining whether a duty exists and the doctrine applies. Carving out a new exception to the doctrine is unnecessary and problematic.

VI. Amicus Raises Issues Beyond the Scope of the Certified Question.

In its brief, the MTLA goes well beyond the scope of the question certified by the Ninth Circuit. Specifically, the arguments in Discussion subsections B-E of MTLA's brief go beyond the scope of the certified question. This Court has previously refused to consider arguments that were beyond the scope of the certified question. Van der hule v. Mukasey, 2009 MT 20, ¶ 6, 349 Mont. 88, 217 P.3d 1019; Frontline Processing Corp. v. American Economy Ins. Co., 2006 MT

344, ¶ 31, 335 Mont. 192, 149 P.3d 906; Sternhagen v. Dow Co., 282 Mont. 168, 170-171, 935 P.2d 1139, 1140 (1997) (citation omitted). Based upon this Court's precedent, the City will not address the extraneous arguments in MTLA's briefing, and requests the Court likewise disregard those arguments.

CONCLUSION

The City of Billings respectfully requests that the Court answer the certified question in the affirmative.

DATED this 23rd day of August, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellant Procedure, I certify that this Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points, is double-spaced, and the word count calculated by Microsoft Office Word 2013, is 5,090 words, including all text, excluding table of contents, table of authorities, certificate of service, and certificate of compliance.

DATED this 23rd day of August, 2017.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 23rd day of August, 2017, I served a true and correct copy of the foregoing on the following persons by the following means:

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CERTIFICATE OF SERVICE

I, Harlan B. Krogh, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-23-2017:

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